

1 ANNETTE L. HURST (STATE BAR NO. 148738)
ahurst@orrick.com
2 ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
3 San Francisco, CA 94105-2669
Telephone: +1-415-773-5700
4 Facsimile: +1-415-773-5759

5 JACOB A. SNOW (STATE BAR NO. 270988)
jsnow@orrick.com
6 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
7 Menlo Park, CA 94025
Telephone: +1-650-614-7400
8 Facsimile: +1-650-614-7401

9 Special Appearance as Attorneys for
Doe Defendant (IP 97.94.162.56)
10

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 HARD DRIVE PRODUCTIONS, INC.,

16 Plaintiffs,

17 v.

18 DOES 1 - 166,

19 Defendant.
20
21
22
23
24
25
26
27
28

Case No. C11-03682 LHK (HRL)

REPLY IN SUPPORT OF MOTION TO
QUASH AND REQUEST FOR
RECOMMENDATION THAT DOE
DEFENDANTS 2-166 BE SEVERED
AND DISMISSED

1 **I. INTRODUCTION**

2 This Court is by now familiar with the facts and law at issue in this motion to quash.¹
 3 This is a strike suit, filed to induce putative defendants to settle to avoid the cost of litigation and
 4 the embarrassment of being publicly accused of illegally downloading pornography. On
 5 November 23, 2011, this Court ordered, in another case involving the same plaintiff represented
 6 by the same counsel with identical factual allegations, that the case be severed and dismissed
 7 against all but one Defendant, and that all motions to quash were moot. The Court wrote:

8 Plaintiff alleges that joinder of all defendants is proper because they
 9 allegedly participated in the same BitTorrent swarm (i.e., the group
 10 of “peers” or users who download a particular file) to download the
 11 film in question. In the months after this court permitted plaintiff to
 12 pursue expedited discovery to learn defendants’ identities, it learned
 13 of a host of similar lawsuits pending in this district. True, this court
 14 initially concluded that, at least at the pleading stage, plaintiff
 15 sufficiently established joinder. However, the court now agrees
 16 with the view and reasoning of many other courts, including in this
 17 district, that plaintiff has not sufficiently established that joinder
 18 would be proper and, further, that even if plaintiff had done so,
 19 joinder would nevertheless be inappropriate.

20 *Hard Drive Productions, Inc. v. Does 1-84*, Case No. C11-03648HRL (N.D. Cal., November 23,
 21 2011) (Lloyd, J.) (citations omitted).² The same result should obtain here. In the alternative, Doe
 22 requests that the Court suspend determination on the motion to quash pending the Court’s ruling
 23 on Doe’s dispositive motions, which Doe plans to file promptly.

18 **II. ARGUMENT**

19 **A. Doe’s Motion To Quash Is Proper In This Court**

20 Hard Drive Productions, Inc. (“Hard Drive”) first argues in its opposition that Doe lacks
 21 standing to bring the instant motion to quash, and that the motion to quash should have been
 22 brought in the district that issued the subpoena, that is, the Central District of Illinois. Opp. at 2-
 23

24 ¹ By Doe’s count, at least seven other cases based on similar facts in which the plaintiff is represented by the same
 25 attorney, are presently pending before the assigned magistrate. See *Hard Drive Productions, Inc. v. Does 1-90*,
 26 C11-03825HRL; *Hard Drive Productions, Inc. v. Does 1-84*, 11-C03648HRL; *Pacific Century Int’l, Ltd. v. Does*
 27 *1-129*, C11-03681HRL; *MCGIP, LLC v. Does 1-30*, C11-03680HRL; *AF Holdings, LLC v. Does 1-135*, C11-
 28 03336LHK-HRL; *Hard Drive Productions, Inc. v. Does 1-69*, 11-C03004HRL; *Pink Lotus Entm’t v. Does 1-46*,
 C11-02263.

² The complaint in this action is identical in substance to the complaint in *Hard Drive Productions, Inc. v. Does 1-84*,
 Case No. C11-03648HRL. The two complaints differ only in that the complaint in this action has duplicate
 pages 11 and 12 and the IP addresses in the complaints’ respective Exhibit A’s are not the same.

3, 8. Both of these arguments are flatly inconsistent with Hard Drive's proposed order submitted with its motion for expedited discovery, which the Court subsequently issued. Hard Drive Productions is thus precluded under the doctrine of judicial estoppel from asserting that Doe lacks standing to bring the motion to quash, or that the Northern District of California is an improper forum for the motion. Alternatively, the Court can also consider and rule on Doe's motion to quash as a motion for a protective order under Rule 26(c)(1). *See Hard Drive Productions v. Does 1-188*, 2011 WL 3740473, *6 (N.D.Cal., Aug. 23, 2011).

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997). "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.'" *Id.*

On August 2, 2011, Hard Drive submitted to this Court an *Ex Parte* Application For Leave To Take Expedited Discovery, seeking Court approval to issue subpoenas to Internet Service Providers to discover the identity of each Doe defendant. With Hard Drive's motion, it submitted a proposed order permitting expedited discovery, which specified that *subscribers* – as opposed to the ISPs themselves – would bring motions to quash, and that the subscribers would do so in *this Court*. Dkt. No. 7. The Court granted Hard Drive's application and issued Hard Drive's proposed order verbatim. Specifically, paragraphs 2 and 3 of the Court's order granting Hard Drive's application state, in their entirety:

2. Each ISP will have 30 days from the date of service upon them to serve the subscribers of the IP addresses with a copy of the subpoena and a copy of this order. The ISPs may serve the subscribers using any reasonable means, including written notice sent to the subscriber's last known address, transmitted by first-class mail or via overnight service.

3. *Subscribers* shall have 30 days from the date of service upon them to file any motions in *this court* contesting the subpoena (including a motion to quash or modify the subpoena). If that 30-day period lapses without a subscriber contesting the subpoena, the ISPs shall have 10 days to produce the information responsive to the subpoena to Hard Drive.

Dkt No. 7 (emphasis added). Hard Drive now contends that its own proposed procedures are

1 improper. Such an about face is precluded under the doctrine of judicial estoppel, and the Court
2 should therefore reject Hard Drive's arguments.

3 **B. Hard Drive Has No Need for Doe's Personally Identifying Information At**
4 **This Time.**

5 Hard Drive also argues that its need for Doe's personally identifying information
6 outweighs Doe's privacy interests. Opp. at 6-7. But, critically, Hard Drive does not explain why
7 it needs Doe's personally identifying information at this time. Doe is represented by counsel in
8 this action and intends to file dispositive motions contesting the allegations in the complaint.
9 Should Hard Drive wish to communicate with Doe regarding settlement, it is free to do so
10 through counsel. This Court has noted that, in similar circumstances, a subpoenaing party's need
11 for a Doe defendants' personally identifying is diminished. *Art of Living Foundation v. Does 1-*
12 *10*, Case No. C11-03648LHK (N.D. Cal., November 9, 2011) (noting that a Doe defendant had
13 "appeared through counsel and filed numerous dispositive motions," which diminished
14 "Plaintiff's need to obtain his true name at this time.").

15 **C. Doe's Motion To Quash Should Be Granted Because Joinder Of Does 1-166 Is**
16 **Improper.**

17 Hard Drive argues that joinder is proper at this stage of the litigation. Opp. at 3-6. But as
18 noted above, this Court ruled on November 23, 2011 in an identical case that joinder was
19 improper and that all defendants but one should be severed and dismissed. *Hard Drive*
20 *Productions, Inc. v. Does 1-84*, Case No. C11-03648HRL (N.D. Cal., November 23, 2011)
21 (Lloyd, J.). The Court's order in *Does 1-84* and the authority relied on therein demonstrate that
22 each of Hard Drive's arguments in its opposition to the present motion are without merit.

23 Hard Drive first argues that joinder of Does 1-166 is proper at this stage of the litigation,
24 citing cases where courts declined to rule on a motion for improper joinder at the pleading stage.
25 Opp. at 3-4. But many courts have concluded that Hard Drive's allegations (or allegations similar
26 to them) are insufficient to support permissive joinder, even at the pleadings stage. In *Hard Drive*
27 *Productions, Inc. v. Does 1-188*, — F. Supp.2d —, No. C11-01566JCS, 2011 WL 3740473 (N.D.
28 Cal., Aug. 23, 2011), for example, Judge Spero extensively analyzed the applicable case law as
well as Hard Drive's factual support for joinder and concluded that joinder was improper. *Id.* at

*7-*14. In *Does 1-188*, Judge Spero analyzed factual allegations identical to those in this case: that Defendants used the BitTorrent protocol to participate in a single “swarm” to download a single file. *Does 1-188* at *13. Concluding that the Doe defendants there had not participated in the “same transaction or occurrence,” Judge Spero wrote:

Here, the Court finds the reasoning in *Boy Racer* and *Diabolic Video Productions*, *Pacific Century International*, and *Millennium TGA* persuasive. Does 1–188 did not participate in the same transaction or occurrence, or the same series of transactions or occurrences. Under the BitTorrent Protocol, it is not necessary that each of the Does 1–188 participated in or contributed to the downloading of each other's copies of the work at issue—or even participated in or contributed to the downloading by any of the Does 1–188. Any “pieces” of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm*. The bare fact that a Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they were part of the downloading by unknown hundreds or thousands of individuals across the country or across the world.

Id. (citing *Boy Racer v. John Does 2–52*, Case No. C11–02834LHK (N.D. Cal., August 5, 2011) (Grewal, J.); *Diabolic Video Productions*, 2011 WL 3100404, at *1 (N.D.Cal. May 31, 2011); *Pacific Century Int’l*, 2011 WL 2690142 (N.D.Cal. July 8, 2011); *Millennium TGA*, 2011 WL 1812786, at *1 (N.D.Cal. May 12, 2011)) (emphasis original).

Notably, Hard Drive does not contest Judge Spero’s analysis, instead choosing to distinguish a single case Judge Spero cited, *BMG Music v. Does 1-203*, 2004 WL 953898 (E.D. Pa. Apr. 4, 2004), on the ground that the case involved multiple defendants and violations of different copyrights. Opp. at 4-5. Hard Drive inaccurately states that the Court in *Does 1-188* “relie[d] on” *BMG Music*. *Id.* As is clear from the quote above, *Does 1-188* relied on not on *BMG Music*, but *Boy Racer*, *Diabolic Video Productions*, *Pacific Century International*, and *Millennium TGA*. The court only cited *BMG Music* for the language characterizing the nature of the defendants’ individual defenses, which applies equally to this case:

Comcast subscriber John Doe could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs’ works. John Does 3 through 203 could be thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs’ property and depriving them and their artists, of the royalties they are rightly owed.

Does 1-188 at *13. This Court should again reject Hard Drive's arguments in support of joinder.

D. This Court Should Recommend That Doe Defendants 2-166 Be Severed And Dismissed.

Federal Rule of Civil Procedure 21 states that: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Fed. R. Civ. P. 21. As is evident from the plain text of the rule, no separate motion from a party is necessary for the Court to sever and dismiss parties who have been misjoined. Indeed, in a variety of contexts, courts in other BitTorrent cases sever and dismiss all but the first Doe defendant without prejudice to a plaintiff refiling against all other Doe defendants in subsequent individual actions. *E.g., Boy Racer, Inc. v. Does 1-60*, No. C11-01738SI, 2011 WL 3652521 (N.D. Cal., Aug. 19, 2011) (Illston, J.) (dismissing case without prejudice as to Doe defendants 8-60 in order ruling on John Doe's motion to quash); *Hard Drive Productions v. Does 1-84*, C11-03648HRL (N.D. Cal. November 23, 2011) (severing and dismissing Does 2-84 in ruling on motion to sever) (Lloyd, J.); *AF Holdings, LLC v. Does 1-97*, C11-03067CW (N.D. Cal., November 1, 2011) (severing and dismissing Does 2-97 in order on motion for leave to amend) (Wilken, J.).

When a motion is pending before a Magistrate Judge and the parties have not consented to magistrate jurisdiction, it is proper to sever all but the first Doe defendant and reassign the remaining defendants to an Article III judge. *E.g., Boy Racer, Inc. v. Does 1-52*, Case No. C11-2329PSG (N.D. Cal. May 31, 2011) (severing Does 2-52 and reassigning them to an Article III judge in order ruling on motion for expedited discovery) (Grewal, J.); *Diabolic Video Productions, Inc. v. Does 1-2099*, C10-05865PSG (N.D. Cal., May 31, 2011) (severing Does 2-2099 and reassigning them to an Article III judge in order ruling on motion for expedited discovery) (Grewal, J.). In *Diabolic Video Productions*, Judge Grewal stated that "[i]n view of the misjoinder described above, the undersigned respectfully recommends that the claims against Does 2 through 2,099 be dismissed without prejudice." *Id.* at 8. Because Judge Koh is already assigned to this action, reassignment is not necessary, and Doe requests only that the Court recommend to Judge Koh that Doe defendants 2-166 be severed and dismissed.

1 **E. In The Alternative, The Court Should Stay Determination On The Motion To**
 2 **Quash Pending Resolution Of Doe's Dispositive Motions And Temporarily**
 3 **Hold Doe's Identity Confidential.**

4 If the Court determines at this stage that Hard Drive's joinder of Does 1-166 is proper,
 5 Doe requests that the Court 1) stay a final ruling on the motion to quash pending resolution of
 6 Doe's intended dispositive motion(s); and 2) temporarily hold Doe's identity confidential.

7 Counsel for Doe in this matter began its representation after Doe's motion to quash was
 8 delivered to Charter Communications and opposing counsel. Doe is preparing a motion to
 9 dismiss, transfer, or sever Hard Drive's complaint on grounds including those discussed in the
 10 Court's recent order, discussed above, in *Hard Drive Productions, Inc. v. Does 1-84*, Case No.
 11 C11-03648HRL (N.D. Cal., November 23, 2011). Therefore, Doe respectfully requests that the
 12 Court stay ruling on this motion pending a final determination of the sufficiency of the complaint.

13 Doe further requests that the Court order that Hard Drive seek leave of Court before
 14 publicly identifying Doe in any filing. In *Hard Drive Productions v. Does 1-46*, Case No. C11-
 15 01959EMC (N.D. Cal. June 23, 2011) the Court made just such an order, requiring that Hard
 16 Drive "seek leave of Court before publicly identifying Doe in any of its filings. Absent Court
 17 order, Doe names shall be kept confidential." *Id.* at 2. Similar relief is appropriate for Doe here.

18 **III. CONCLUSION**

19 For the reasons stated above, Doe respectfully requests that the Court grant Doe's motion
 20 to quash Hard Drive's subpoena and issue a recommendation that Does 2-166 be severed and
 21 dismissed from this action.

22 Dated: December 5, 2011

Respectfully submitted,

ANNETTE L. HURST
 JACOB A. SNOW
 Orrick, Herrington & Sutcliffe LLP

 /s/ Jacob A. Snow /s/

Jacob A. Snow
 Specially Appearing as Attorneys for Doe
 Defendant (IP 97.94.162.56)